

Issue: Compliance – Grievance Procedure (documents); Ruling Date: November 26, 2013; Ruling No. 2014-3731; Agency: Department of Motor Vehicles; Outcome: Grievant in Compliance.



*COMMONWEALTH of VIRGINIA*  
*Department of Human Resource Management*  
*Office of Employment Dispute Resolution*

**COMPLIANCE RULING**

In the matter of the Department of Motor Vehicles  
Ruling Number 2014-3731  
November 26, 2013

The Department of Motor Vehicles (the agency) has requested a compliance ruling from the Office of Employment Dispute Resolution (“EDR”) at the Department of Human Resource Management for alleged noncompliance with the grievance procedure regarding the grievant’s estimated costs for the production of documents.

FACTS

At issue in this case are the agency’s requests for the production of documents from the grievant, which were the subject of EDR Ruling Number 2014-3697. The agency is seeking certain specific records during a short timeframe, but also has requested essentially all records in the grievant’s or his attorney’s possession related to the events for which the grievant was placed on pre-disciplinary leave over a more expansive time period. The grievant has estimated that it will take approximately 80 hours to locate and produce responsive documents. He further quotes a search and collection amount of \$100 per hour, bringing his total estimated costs to \$8,000. The agency disputes this amount as unreasonable and has requested that EDR address the estimate in this ruling.

DISCUSSION

The *Grievance Procedure Manual* provides that any party requesting documents “may be charged a reasonable amount not to exceed the actual cost to retrieve and duplicate the documents.”<sup>1</sup> In interpreting this section, EDR will look to other analogous laws and regulations for guidance if needed. Principles and approaches arising under the Virginia Freedom of Information Act (“FOIA”) are, as discussed above, an immediately relevant resource. For instance, under FOIA, an agency may request payment of a deposit in advance before producing documents in certain cases.<sup>2</sup> Such a practice would appear to be reasonably applicable and useable under the grievance process for either party. However, EDR must also review whether the grievant’s estimated charges are reasonable under the facts of this case. Furthermore, it must be noted as an initial matter that the proposal is an estimate only and is subject to modification after production is completed and the actual time spent can be calculated.

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<sup>1</sup> *Grievance Procedure Manual* § 8.2.

<sup>2</sup> Va. Code § 2.2-3704.

While EDR has had occasion to address these questions in other cases as to an agency's estimated costs for production of documents, we have never addressed such costs estimated by a grievant. Indeed, document requests made by an agency to a grievant are extremely rare. Such a situation raises unique questions with dissimilar postures and interests at issue than the assessment of cost estimates made by an agency. For example, the role of cost being an impediment to the production of documents is not as great an interest when it is the agency whose ability to pay is in question versus a grievant, especially one who is unemployed. Additionally, an agency will be more familiar with the tasks, time, and personnel required to complete document collection and production tasks versus most grievants or their representatives.

While the grievant has presented very little substantive detail of the overall volume of records to be reviewed, whose possession they are in, what steps will be taken, and by whom, to name but a few potential questions, EDR does not have a basis at this time to find this *estimate* unreasonable. Based on information from the grievant's attorney, he purports to have a large volume of paper records, at least comprising four banker's boxes and one file cabinet drawer, and an unknown amount of electronic records of various types. These records appear to be from a variety of sources, including direct production from the agency at one time or another. It is not clear whether there are additional records in the possession of the grievant, as some of the agency's requests would appear to seek documentation specifically in his possession (i.e., text messages and/or personal e-mails).

In some ways, the effort required to respond to the agency's requests could be seen as limited. For example, the agency has requested certain very specific sets of documents, such as text messages for a limited period of time.<sup>3</sup> Whether records of any such text messages exist could be relatively quickly determined, although collection and production of the records reflecting those messages could take time. In addition, the agency has stated it is not seeking copies of documents provided by the agency.<sup>4</sup> Presumably, most of the documentation within the grievant's and his attorney's possession would be records produced by the agency. Thus, one would assume that there would be a much smaller subset of materials for the grievant to have to review to discover potentially responsive documentation not previously sent to him by the agency. However, the grievant's attorney has noted that he has not kept his files separated by the source of the documents.<sup>5</sup>

On the other hand, while some of the agency's requests are very targeted and specific, others are more general and could be viewed as encompassing any document (not previously produced by the agency) related to the subject of the due process notice and pre-disciplinary suspension challenged.<sup>6</sup> These more general requests would understandably require a more thorough review of the entire set of potentially responsive documents. Further, in any collection

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<sup>3</sup> See EDR Ruling No. 2014-3697.

<sup>4</sup> *Id.*

<sup>5</sup> EDR may be asked to address in a future ruling on final costs whether keeping records in such a manner could lead to increased costs for collection and production of responsive documentation and whether such cost increases may reasonably be passed on to the opposing party.

<sup>6</sup> See EDR Ruling No. 2014-3697.

effort, we presume, the grievant or his attorney would be reviewing the documents for issues of privilege and/or needed redactions, just as the agency would do. Therefore, a response to the agency's document requests could understandably take some time to complete. While it is not clear at this time that 80 hours would truly be needed to complete the collection and production of the requested documents, we can understand, here, an attempt by the grievant to be cautious to avoid an underestimate.

In upholding an agency's estimated charges we have required much more specificity about how documents will be collected and produced, from what sources or media, and the volume involved.<sup>7</sup> However, as we have ruled in similar cases, the agency, like the grievant here, will need to account for and document the time and effort expended and present the actual cost amounts once the collection and production is complete.<sup>8</sup> Thus, both parties will be ultimately subject to the same standard of actual costs as a maximum.<sup>9</sup>

If EDR were to reduce the grievant's estimate, as was done to the agency's estimate in a different grievance,<sup>10</sup> based on what has been reviewed, a possible result would be to reduce the grievant's estimate by half, a reduction approximately similar to the reduction made in that other grievance. However, half of the grievant's estimate is precisely the amount the agency will be required to deposit to proceed with its document requests. It is clear that some not insignificant amount of work will be required for the grievant to respond properly to the document requests. Placing on deposit an amount equivalent to 40 hours of work is appropriate as a reasonable estimate at this time.

The grievant's attorney has also stated to EDR that the deposit received from the agency will be kept in a separate account. Once costs are determined, any amounts due for return to the agency can be easily accounted for without prejudice. The grievant's attorney must be mindful that he will need to keep an accurate record of time expended and efforts undertaken in the document collection and production process by both himself and his client to be considered an appropriate and reasonable cost due to be collected. EDR considers the agency to have the same burden.

### CONCLUSION

EDR will not disturb the grievant's estimate of document collection and production costs at this time. Thus, to proceed with its request for documents, the agency must provide payment of a deposit of one-half of the estimated costs to the grievant's attorney before the grievant or his attorney is required to produce documents, unless the parties reach some agreement otherwise. Absent such an agreement, the agency must provide the grievant or his attorney with the requested deposit within **five workdays of its receipt of this ruling**. If additional time is needed to make the appropriate transaction, EDR will entertain a request from the agency within five workdays of receipt of this ruling. If no such extension is entered and the deposit is not provided

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<sup>7</sup> E.g., EDR Ruling No. 2014-3663; EDR Ruling Nos. 2010-2628, 2010-2629.


<sup>8</sup> *Id.*

<sup>9</sup> See *Grievance Procedure Manual* § 8.2.

<sup>10</sup> EDR Ruling No. 2014-3663.

within the given deadline, the document requests will be considered waived. Once collection and production are complete, final costs can be determined and any additional payment or returns processed. Such final costs may be the subject of an EDR compliance ruling if requested.<sup>11</sup>

EDR's rulings on matters of compliance are final and nonappealable.<sup>12</sup>



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<sup>11</sup> In such a ruling, EDR may have need to address whether the hourly rate estimated by the grievant's attorney is reasonable. For instance, document collection and production efforts that are or would be more reasonably conducted by the grievant himself would not likely be properly accounted for at the currently quoted rate.

<sup>12</sup> Va. Code §§ 2.2-1202.1(5), 2.2-3003(G).